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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: APR 29 2010
SRC 07 800 25579

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO dismissed the petitioner's appeal. The matter is now before the AAO on motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

This petition, filed on July 28, 2007, seeks to classify the petitioner pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director and the AAO found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On motion, the petitioner states that the documentation of record demonstrates that his achievements have had an impact in his field of endeavor and that he thus qualifies for the classification sought. For the reasons discussed below, we affirm our prior decision.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability.--
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner received his Ph.D. in Chemistry from Baylor University in 2005. The director and the AAO found that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't of Transp., 22 I&N Dec. 215, 216 (Comm. 1998) [hereinafter "*NYSDOT*"], has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The director found that the petitioner works in an area of intrinsic merit, synthetic chemistry, and that the proposed benefits of his work would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

In a statement accompanying the initial filing of the petition, the petitioner stated:

> I am currently a key researcher in the Research and Development Division at [redacted], spearheading three vital investigations. One project is to develop novel[] bifunctional chelates for targeted nano-particle applications. . . . The project includes multi-step synthesis and characterization of lanthanide chelates which will be used in the pre-clinical development of new PARACEST contrast agent formulations. The second project involves the creation of ligands that are largely used by university and company research labs which are looking to create novel drugs to target cancer treatment or diagnosis. The third project . . . is to develop and make available chelates that have performance features such as high efficiency radiolabelling at room temperature while maintaining stability comparable to industry standard chelates. . . . In general for all the projects, I am in charge of planning and conducting synthetic organic and inorganic chemistry transformations, carrying out analytical characterization of intermediates and final products . . . , consulting primary literature relevant to the projects and keeping accurate records of the progress of my work.

The petitioner stated that he "served as an Adjunct Instructor of Organic Chemistry at Mountain View College, Dallas, TX. . . . Furthermore, I served as instructor of GED Preparation in Spanish through Continuing education program at the same college. Spanish GED is a crucial educational step for many Spanish-speaking students." He asserted: "my role as a teacher at the college level is [of] extreme importance for the US, since I am training and preparing young citizens for their careers. Critical budget shortages and an overworked full-time faculty have created opportunities in higher education for private citizens to function as part-time professors." With regard to the petitioner's work as a teacher and an instructor, the AAO stated:

> Classroom instruction generally lacks national scope. *Cf. Matter of New York State Dept. of Transportation* at 217, n.3. Several of the petitioner's assertions about education are general, and apply to all competent teachers. As such, they address the intrinsic merit of teaching, but they do not distinguish the petitioner from others performing the same tasks.

On motion, the petitioner argues that a May 11, 2007 letter from [redacted] Professor of Medicine and Biomedical Engineering, Washington University in St. Louis, Missouri, establishes that the petitioner's qualifications are above those of his peers in the field and that his work in "planning and synthesizing novel targeted molecular imaging molecules" is "highly specialized." [redacted] states:

> I have known [the petitioner] for one year during which time he has been employed at Macrocyclics, Inc. Under the supervision of [redacted] [the petitioner] has been responsible for performing advanced organic syntheses of highly novel, PARACEST chelates. The development of these chelates to detect, characterize, and treat cancer in its most nascent and vulnerable stages is funded by the U.S. National Cancer Institute (NCI) as part of an overall nanomedicine program. The synthetic and nanotechnology work performed by [the petitioner] is highly specialized and only a few laboratories are able to contribute similar research worldwide. The collaboration between Washington University Medical School and Macrocyclics has been very productive, and a significant slice of the credit goes to [the petitioner]. Because of the rarity of scientists in the United States with [the petitioner] skills and experience, we consider ourselves very fortunate to have established his collaboration, which we hope will continue long into the future.

It cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *NYSDOT*, 22 I&N Dec. at 221.

[redacted] further states that the petitioner "has produced several PARACEST chelates for research evaluation. A major chemical company working on the same project only produced one chelate over two years." In its appellate decision the AAO indicated that "[t]his anecdotal assertion about an unnamed chemical company, with no discussion of potential complicating factors, is not sufficient to qualify the petitioner for the special benefit of the national interest waiver." We reaffirm our prior finding. The evidence submitted on motion does address the preceding deficiency. Moreover, [redacted] letter does not provide specific examples of how the petitioner's original work has influenced the field of synthetic chemistry.

The petitioner quotes a June 14, 2007 letter from [redacted], stating: "Give[n] the highly specialized nature of our business it is imperative that we are able to recruit suitably trained and experienced staff members." With regard to the petitioner's specialized training and experience, objective qualifications necessary for the performance of a research position can be articulated in an application for alien employment certification. Pursuant to *NYSDOT*, 22 I&N Dec. at 221, an alien cannot demonstrate eligibility for the national interest waiver simply by establishing a certain level of training, education, or experience that could be articulated on an application for employment certification. [redacted] does not give specific examples of how the petitioner's work has already influenced the field.

[redacted] further states: "Macrocyclics wishes to temporarily employ [the petitioner] in the specialty occupation of Post-Doctoral Research Associate until March 31, 2008." The regulation at 8 C.F.R. § 214.2(h)(16)(i) permits an alien to work under an H-1B visa while a visa petition or labor certification is pending. Therefore, the petitioner's continued participation in the company's imaging agent research is obviously not contingent on him obtaining permanent resident status.

The petitioner also quotes a November 15, 2008 letter from [redacted] of Radiology and Biomedical Engineering at the University of Texas Southwestern Medical Center (UTSMC), Dallas, stating:

> Recently in collaboration with [redacted], one of my research interests was focused on the evaluation of a novel group of chelating agents for the application of copper radiopharmaceuticals. [The petitioner's] talents in organic chemistry excelled in designing and synthesizing multiple DOTA-based new chelating agents with an ethylene to cross-bridge two non-adjacent nitrogen atoms so as to constrain the open structure of DOTA for an ideal coordination environment of Cu(II) ion. Based on the preliminary biological evaluation conducted in my research laboratory, the new copper complexes have exhibited anticipated in vivo stability and desirable tissue distribution. Now we are about to move this exciting research to diagnostic PET imaging of cancer. [The petitioner] made tremendous contributions to our current DOTA-related projects in collaboration with Macrocyclics Inc.
>
> [The petitioner's] strong educational background, expertise in the organic design and synthesis, technical skills, and capability of cooperation make him well qualified to work in the highly-demanding environment of his current position.

[redacted] does not explain how the petitioner's work impacted the field beyond the scope of their collaborative DOTA-related projects. Rather, [redacted] letter focuses primarily on the petitioner's educational background, technical skills, and expertise in organic chemistry. As discussed previously, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Regardless of the alien's particular experience or skills, even assuming they are unique, the benefit the alien's skills or background will provide to the United States must also considerably outweigh the inherent national interest in protecting U.S. workers through the labor certification process. *NYSDOT*, 22 I&N Dec. at 221.

In addressing the citation records submitted by the petitioner, the AAO's appellate decision stated:

> With respect to the citation of his work, the petitioner submitted printouts from various databases. One printout showed that one of his articles was cited three times (including one self-citation), and another was cited four times (including two self-citations). A third article was cited once, in a review article. The petitioner did not show that this is a particularly significant citation rate in his specialty.

On motion, the petitioner acknowledges the AAO's finding that his body of published work has only been independently cited to "five times" by others in his field. The petitioner then points out that

"the work performed at Macrocyclics has not been yet published." A petitioner, however, must establish eligibility for the benefit sought at the time of filing the petition. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). A petitioner cannot file a petition under this or any other classification based on the expectation of future eligibility. *Id.* at 49. The limited number of independent citations submitted by the petitioner is not sufficient to demonstrate that his publication record at the time of filing the petition had significantly influenced his field as a whole or otherwise sets him apart from others in his field.

Citations are not the only means by which to show the petitioner's impact on his field. Independent witness letters can play a significant role in this respect. In these proceedings, however, the petitioner has submitted letters, which, as discussed in the AAO's previous decision and in the present matter, collectively fail to establish the depth or extent of his influence in the synthetic chemistry field. USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from individuals selected by the petitioner is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). In this case, the content of the letters of support submitted by the petitioner does not establish that his research accomplishments at the time of filing had already had a significant national impact or otherwise influenced his field as a whole.

The petitioner asserts that the impact of his work is demonstrated through:

> The number of new products that the R&D [Research and Development] department was able to launch into the market. Since February of 2006 (date when I was hired) the company launched four new products into the market in which I was a part of the product development process. Also, I was involved in the production and optimization process of the products that [the] company offers commercially, currently thirty two (32) products.

The petitioner's motion includes a Macrocyclics "Product List" identifying its Bifunctional Chelators, Ligands, and Magnetic Resonance Reagents. The record, however, does not include a letter of support from any of the petitioner's superiors at Macrocyclics identifying the specific products developed by him or the extent of his contribution to those products. Moreover, in evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7. In this instance, there is no evidence showing that the petitioner was the first researcher to ever develop the compounds in the product list or that his original compounds have significantly impacted the field beyond Macrocyclics' immediate customers.

The petitioner also asserts that the impact of his work is demonstrated through the number of scientific publications "that cited Macrocyclics Inc as source of material." We note here that the petitioner is simply repeating arguments already made in response to the director's request for evidence. The petitioner previously stated:

> Another way to look at the impact of my research and work would be by checking into the scientific papers published during the last two years that claimed the use of compounds made by Macrocyclics. It is important to add that since the company is small, the work and contribution[s] of its members have a tremendous impact on its overall performance. . . . The common feature to highlight about these research papers is that without the compounds we made at Macrocyclics such studies could not take place.

In addressing the preceding comments, the AAO's appellate decision stated:

> The petitioner did not show that Macrocyclics was unable to produce anything for sale prior to the petitioner's arrival; that he was personally responsible for every product subsequently developed; or that Macrocyclics was the only possible source for the compounds used in the published research. Therefore, we cannot be persuaded by the assertion that the petitioner deserves indirect credit for every published experiment that involved Macrocyclics products.

The petitioner's motion includes the results of a "Google scholar" internet search for "Macrocylic Inc" from 2006 – 2008. The results include several journal articles in which the research studies utilized the company's products, but there is no indication that any of these articles single out the petitioner's individual work. Search results for the petitioner's company do not establish that the petitioner himself serves the national interest to an extent that justifies a waiver of the job offer requirement.

In response to the AAO's observation that the petitioner had not shown that "Macrocyclics was the only possible source for the compounds used in the published research," the petitioner submits Chemical Abstracts Service registry number search results from ChemIndustry.com for four compounds he claims to have developed for Macrocyclics. The petitioner asserts that these search results indicate that Macrocyclics is the sole provider of those four compounds making his contribution "extremely important and in the national interest." As discussed previously, the record does not establish that the petitioner was the first researcher to ever develop the compounds and that his original compounds have significantly impacted the field beyond Macrocyclics' immediate customers.

The petitioner quotes a letter from [redacted] of Chemistry, Georgetown University, stating that his laboratory "decided to purchase [certain] compounds from Macrocyclics, Inc." after attempting "with limited success" to synthesize the compounds themselves. [redacted] asserted: "The synthetic methods involved are deceptively simple but require expert synthetic skill." Simple training in advanced technology or unusual skills, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *Id.* at 221.

The petitioner's initial evidence included a January 15, 2007 letter stating that he "was duly elected an *associate* Member of Sigma Xi." [Emphasis added.] On motion, the petitioner states: "The

recognition of my work by my peers was in evidence when my membership in Sigma Xi, The Scientific Research Society, changed from member to a Full Member status in less than a year." The record, however, does not include evidence of this change in the petitioner's Sigma Xi membership classification or its effective date. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner's initial evidence also included his membership card for the American Chemical Society (ACS). With regard to the petitioner membership in the ACS and Sigma Xi, we note that professional association membership is a regulatory criterion for classification as an alien of exceptional ability, a classification that normally requires an approved labor certification. 8 C.F.R. § 204.5(k)(3)(ii). We cannot conclude that meeting one, two, or even the requisite three criteria for classification as an alien of exceptional ability warrants a waiver of the labor certification requirement in the national interest. By statute, "exceptional ability" is not, by itself sufficient cause for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Thus, the *benefit* which the alien presents to his field of endeavor must greatly exceed the "achievements and significant contributions" contemplated for that classification. *Id.; see also id.* at 222.

The AAO's appellate decision noted that the petitioner's evidence "did not establish how his contributions set him apart from others in the field." The AAO further stated:

> Witness letters and other exhibits showed that the petitioner developed compounds that other laboratories purchased and used, but the petitioner has not shown that this makes him at all unusual in his field. His employer, Macrocyclics, exists for the purpose of formulating and selling certain chemical compounds. That the petitioner acts within those parameters is a mark of professional competence rather than one of distinction. By the same token, identification of Macrocyclics' clients does not distinguish the petitioner from others who, like him, engage in the business of selling chemicals to laboratories.

We affirm our prior findings. While the petitioner is skilled at synthesizing chemicals and has earned the admiration of his references, he has not established that his past record of achievement in this area is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner. We note here that the national interest waiver contemplates that the petitioner's influence be national in scope. *NYSDOT*, 22 I&N Dec. at 217 n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219 n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole.")

As is clear from a plain reading of the statute, it was not the intent of Congress that every alien of exceptional ability or who holds an advanced degree should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given occupation, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not

established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The AAO's August 4, 2009 decision dismissing the appeal is affirmed. The petition will remain denied.